IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-7161

CARTWRIGHT VAN LINES, INC.,
Appellant,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF MISSOURI, WESTERN DIVISION

JURISDICTIONAL STATEMENT

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No.

CARTWRIGHT VAN LINES, INC.,
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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of a three-judge United States District Court for the Western District of Missouri, Western Division, entered on August 4, 1975, dismissing a complaint seeking to set aside orders of the Interstate Commerce Commission.[1]

[1] The named defendants in the proceeding below were the United States of America and the Interstate Commerce Commission, appellees herein. Three parties intervened as defendants below – Bekins Van Lines Co., Lyon Van Lines, Inc., and United Van Lines, Inc. They are included as appellees before this Court.

OPINIONS BELOW

The Memorandum and Order of the three-judge District Court are unreported. A copy of the Memorandum and Order of the District Court is attached hereto as Appendix A. The opinions of the Interstate Commerce Commission are unreported. Copies of pertinent portions of the Commission's decisions are attached hereto as Appendix B.

JURISDICTION

This suit was brought in the District Court on March 18, 1974, pursuant to 28 U.S.C. § 1336, to set aside certain orders of the Interstate Commerce Commission. In accordance with 28 U.S.C. § 2325, then in effect, a three-judge District Court was convened to hear and determine the case.

The final judgment of the District Court, dismissing the complaint, was entered on August 4, 1975. See Appendix A hereto. A timely appeal was taken, within the 60 days prescribed by 28 U.S.C. § 2101(b), by filing a notice of appeal in the District Court on September 17, 1975. See Appendix A, hereto, pp. 1a-2a, *infra*. Pursuant to this Court's Rule 13(1), this appeal has been docketed in this Court within 60 days from the filing of the notice of appeal. The jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U.S.C. § 1253 and § 2101(b).

Since this action was commenced in the District Court long prior to February 28, 1975, the effective date of the procedural reforms effected by Public Law 93-584, 88 Stat. 1917, the three-judge district court

requirement and the availability of a direct appeal to this Court are still controlling in this action. See 28 U.S.C. § 2325, which has been repealed as to actions commenced on and after March 1, 1975. See, generally, Boskey and Gressman, *Recent Reforms in the Federal Judicial Structure – Three-Judge District Courts and Appellate Review*, 67 F.R.D. 135, 136, 154-156 (1975).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission, having determined that motor carrier applications for expanded authority to transport household goods filed within a particular time frame must be judged upon the basis of special criteria, may arbitrarily and without explanation ignore such criteria and discriminatorily apply entirely different criteria to one such application filed within that time frame.

2. Whether a federal district court, sitting in review of such action by the Interstate Commerce Commission, may reinterpret to the point of extinction the special criteria established by the Commission and supply a rationale for the Commission's action that the Commission itself did not supply.

STATUTES INVOLVED

1. Section 207 (a), Interstate Commerce Act, 49 U.S.C. §307(a):

"Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements,

rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* that no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

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2. **Section 10(e), Administrative Procedure Act, 5 U.S.C. § 706:**

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully witheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * * *

(D) without observance of procedure required by law;

* * * *

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

STATEMENT OF THE CASE

October 20, 1969, is a critical date in this proceeding. On that date, the appellant Cartwright Van Lines, Inc. (hereinafter "Cartwright"), filed with the Interstate Commerce Commission (hereinafter "ICC") an application for authority to expand and improve its nationwide household goods carrier service. The application was filed pursuant to § 207 of the Interstate Commerce Act, 49 U.S.C. § 307.

Prior to filing the application, Cartwright held some 34 individual grants of authority to transport household goods between a number of points in 46 states and the District of Columbia.[2] But those grants did not include the right to operate directly between any and all points within those 47 jurisdictions. Many of Cartwright's authorized routes were tacked on to other authorized routes, the common point of contact between two such routes being known as a "gateway." As a result, instead of being able to provide direct service between many authorized points, Cartwright frequently had to observe circuitous routes over its various authorities tacked together at the gateways.

The main purpose of Cartwright's 1969 application was to receive authority to eliminate 16 such gateways and to render direct service to all points it could serve through its tacking process. Cartwright also sought authority to serve the state of Nevada. The net effect of the authority sought, plus that already held, would have enabled Cartwright to render the equivalent of

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[2]Cartwright did not have authority to transport in North Dakota, Nevada, Hawaii or Alaska.

nationwide household good motor carrier service on a direct route basis.

While the application was filed in 1969, the ICC did not finally deny the application until 1973 and the judicial affirmance of that denial did not occur until 1975. The story of this case, however, is not found in a recounting of the evidence supporting the application or the denial thereof on the basis of the two criteria utilized by the ICC. The statement, rather, is a bizarre account of a discriminatory refusal by the ICC to apply to one particular carrier, Cartwright, the previously-announced special criteria for determining whether a household goods carrier application filed in 1969 meets the statutory standard of "public convenience and necessity." And the story is capped by a judicial reinterpretation of these special criteria to the point of obliteration. The court below has found that the ICC never really said what it very plainly did say in its published opinions by way of establishing these special criteria for household goods carrier applications filed in the 1969 era.

A. The Alternative Criteria

The basic statutory standard for granting operating authority to a motor carrier is a finding by the ICC that the proposed service "is or will be required by the present or future public convenience and necessity." § 207(a) of the Interstate Commerce Act, 49 U.S.C. § 307(a). The broadness of the "public convenience and necessity" standard has caused the ICC to promulgate from time to time various criteria by which compliance with that standard may be tested. There are, by

common agreement, at least two alternative sets of criteria by which Cartwright's application might have been tested, and was in fact tested. The first set, promulgated in the landmark ICC decision in *Pan American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936), deals with the traditional tests for any and all new motor carrier applications. A second or alternative set of criteria has been established in *Childress – Elimination Sanford Gateway*, 61 M.C.C. 421, 428 (1952), for testing applications like Cartwright's that seek direct operating authority and the elimination of the necessity of observing gateways.

Pan American traditional criteria	**Childress gateway elimination criteria**
1. Whether "the new operation or service will serve a useful public service, responsive to a public demand or need."	1. Whether the carrier is "actually transporting a substantial volume of traffic from and to the points involved by operating in good faith through the gateway and, in so operating, is effectively and efficiently competing with the existing carriers."
2. Whether this purpose "can or will be served as well by existing lines or carriers."	2. Whether elimination of the gateways would permit the carrier "to institute a new service or a service so different from that presently provided as to materially improve applicant's competitive position to the detriment of existing carriers."

3. Whether this purpose "can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest."

3. Whether elimination of the gateway requirement will result in "more efficient and economical service."

While the court below professed to the contrary, a series of ICC decisions has revealed a third set of criteria, developed to deal with an acute crisis in the household goods moving industry in the late 1960's. The seminal decision was *Fernstrom Storage & Van Co. Ext. – Nationwide*, 110 M.C.C. 452 (1969), where a household goods carrier was granted additional authority to enable it to provide a nationwide household goods transportation service between all points in the 48 contiguous states.

In finding that the grant of the *Fernstrom* application conformed to the statutory standard of "public convenience and necessity," the ICC expressly made its own review and conclusions respecting the inadequate state of this particular industry. As explained in the ICC's 84th Annual Report to Congress (1970), pp. 52-53:

> "[I]n *Fernstrom Storage & Van Co. Ext. – Nationwide* (110 M.C.C. 452) we granted nationwide nonradial household goods authority. This was the first such grant in several decades. The report reviewed the quality and quantity of the services available from existing carriers and concluded that, due primarily to their failure to provide timely service, these carriers were not able to provide a reasonably adequate service. In

> arriving at this conclusion, we considered many factors including demographic changes through increasing population mobility, and the problems existing in the household goods moving industry. It was determined that the slight detrimental effect to the existing carriers would be outweighed by the more adequate service that would become available to the public."

In short, the ICC found in 1969 that the foreseeable needs of the moving public required that the services of established, well-organized carriers be expanded in order to insure that the nationwide household goods moving system be responsive to the Nation's needs.

By thus making its own finding and conclusion as to the public convenience and necessity respecting improved nationwide household goods moving facilities, the ICC was able to waive proof by such applicants of most of the *Pan American* traditional criteria and the *Childress* gateway elimination criteria, and to reduce to two the criteria to be met by such applicants. As summarized in the last ICC decision granting such an application, the *Fernstrom* criteria, given the ICC's own general finding concerning the public needs for expanded nationwide service in this industry, only requires "findings (1) that the applicants are already effective competitors for household goods traffic over much of the country, and (2) that *conditions prevailing in the industry at the time of filing* were such as to warrant the authorization of additional nationwide service." *King Van Lines, Inc., Extension – 48 States*, 114 M.C.C. 866, 870 (1972); emphasis added.

The *King* decision also put a critical time caveat on the application of the *Fernstrom* criteria. Those criteria, said the ICC, related only to "conditions prevailing in

the industry at the time of filing" the applications of the established carriers to expand and improve their nationwide service of moving household goods. And that "time of filing" was related to the time period as to which the ICC in *Fernstrom* found a crisis-type shortage in the household goods moving facilities – a period roughly covering 1969 and early 1970. Reiterating this emphasis on "the time of filing" a *Fernstrom*–type application, the ICC in *King*, 114 M.C.C. at 872, put the time of filing limitation in these terms:

> "The decisions on these applications are responsive to *conditions which existed at the time of their filing.* Needless to say, however, these grants do not herald an era of free entry into the field of transcontinental household goods transportation. It is to be expected that, with the authorization of such additional services, and with our recent promulgation of comprehensive new regulations covering the movement of household goods, the quality of available service will have been elevated considerably. *Thus, in the future, our determinations of public convenience and necessity in this field will necessarily accord due weight to the evidence then before us, of the extent to which the public's service needs are already being met by authorized carriers.*" [Emphasis added.]

What *King* called "in the future" determinations thus related to household goods carrier applications filed *after* the 1969-70 crisis period.[3] Such "future"

[3] An example of an "in the future" application, where the *Fernstrom* crisis criteria did not apply, is found in *Engel Van Lines, Inc. v. United States*, 374 F. Supp. 1217 (D. N.J. 1974), a case much relied upon by the court below in the instant case. See 374 F. Supp. at 1220, note 5.

applications were to be tested either by the *Childress* gateway elimination criteria or the *Pan American* general criteria. To reiterate, therefore, the *Fernstrom* crisis criteria were deemed applicable only to those applications filed during the 1969-70 crisis period. And since Cartwright's application was filed on October 20, 1969 – during the midst of this crisis period – it was obviously to be governed by the *Fernstrom* criteria.

The *King* decision of the ICC further indicates that, apart from the Cartwright application, at least 11 applications of this type were filed during the 1969-70 period when the *Fernstrom* criteria were considered applicable.[4] Cartwright's application also having been filed during the critical 1969-70 period, a total of at least 12 applications thus became subject to the *Fernstrom* crisis criteria. As the *King* decision made clear, 114 M.C.C. at 871-872, all such "contemporaneously" filed applications must be tested by "the criteria established in the *Fernstrom* case" and "must be decided on the same standards as those other

[4] See footnote 2 of the *King* decision, 114 M.C.C. at 869. That footnote lists nine "requests for transcontinental household goods authority which were filed shortly after the issuance of the entire Commission's decision in *Fernstrom Storage and Van Co. Ext. – Nationwide*, 110 M.C.C. 452 (1969)."

Those applications were filed by American Red Ball Transit, Inc. (No. MC-6992); Global Van Lines, Inc. (No. MC-41098); Lyon Van Lines, Inc. (No. MC-5429); Neptune World-Wide Moving, Inc. (No. MC-31024); Republic Van & Storage Co. (No. MC-110585); Security Van Lines, Inc. (No. MC-8768); Trans-American Van Service, Inc. (No. MC-22254); Trans-World Movers, Inc., (No. MC-91053); and Wheaton Van Lines, Inc. (No. MC-87113). Adding the Fernstrom and King applications makes a total of 11 applications mentioned in the *King* decision. Cartwright's application was not mentioned in this listing.

applications"; and where those criteria have been satisfied an application of this type "must be granted." At least nine of the 11 applications listed in *King* were in fact granted on the *Fernstrom* basis, the other two being withdrawn or denied.

B. The Cartwright Application

As indicated, Cartwright's application for expanded nationwide service in the movement of household goods was filed on October 20, 1969, exactly 13 days after the rendition of the *Fernstrom* decision. The application led to an oral hearing before a Hearing Examiner in May and August of 1971.

At that hearing, the application was supported by testimony of representatives of the Department of Defense ("DOD"), 11 commercial concerns whose activities included movement of their employees' household goods ("national accounts"), four of Cartwright's agents, one individual concerned with his own household goods movements, five freight forwarders of household goods, and two other household goods carriers. Seven large nationwide motor carriers of household goods protested the application and submitted opposing evidence (including the three carriers who are appellees before this Court).

That the evidence submitted by Cartwright was virtually identical to that submitted by the other applicants governed by the *Fernstrom* criteria, and whose applications were accordingly granted, can be seen from the following table:

	Cartwright	Lyon	Red Ball	Neptune
States of operation prior to 48-state application	46	48	45	35
Support of DOD	yes	yes	yes	no
Support of agents	4	none	3	none
Support of other carriers	2	none	none	2
Support of national accounts	11	22	8	22
Support of individuals witnesses	1	none	none	none
Support of freight forwarders	Affiliate and 4 others	none	Affiliate only	none
Total Support	24	23	13	24
Population and/or migration data	none	none	none	yes
Date of filing application	10-20-69	10-31-69	8-15-69	2-9-70

Hearing Examiner Reilly served his Report and Recommended Order on April 17, 1972. See Appendix B hereto, pp. 1b-5b, *infra*. Making no mention whatever of the *Fernstrom* crisis criteria and giving no significance to the filing date of the Cartwright application, the Hearing Examiner concluded that the application should be denied. In so recommending, he tested the application solely in terms of (a) the *Childress* gateway elimination criteria, and (b) the general *Pan American* criteria.

Cartwright filed exceptions to the Hearing Examiner's report. Among those exceptions (see pp. 16-17 thereof) was the claim that the application should be governed by the *Fernstrom* crisis criteria, and that if the ICC "is going to apply certain principles to the Lyon, Red Ball, King and Neptune proceedings [all filed contemporaneously with Cartwright], then certainly the same criteria must apply to the Cartwright application."

Upon exceptions by Cartwright, and supplemented by DOD's exceptions, the ICC Review Board No. 2 served its Decision and Order on August 1, 1972, sustaining the Hearing Examiner's ultimate conclusion. See Appendix B hereto, pp. 7b-9b, *infra.* The Board found, as did the Examiner, that Cartwright had failed to meet the *Childress* gateway elimination criteria. But the Board did at least take cognizance of the *Fernstrom-King* crisis criteria to the extent of stating (see p. 8b, *infra*) that

> "... the examiner's findings are in conformity with the decision in *King Van Lines, Inc., Extension – 48 States*, 114 M.C.C. 866 (1972), in which Division 1 concluded that *in the future*, determinations of public convenience and necessity in the household goods field will necessarily accord due weight to the evidence of the extent to which the public's services are already being met by authorized carriers; ... " [Emphasis added.]

Thus the Board in effect found that the *Fernstrom – King* crisis criteria would have been applicable to Cartwright's application but for the fact that it was an "in the future" case within the meaning of the *King* cut-off date. Totally ignored by the Board was the fact that Cartwright's application had been filed on October 20, 1969, well before that cut-off of the crisis period.

Upon further appeal by Cartwright and the DOD, Division 1 of the ICC expressly affirmed the finding and conclusions of the Review Board. See Appendix B hereto, pp. 9b-11b, *infra*. It did so without any recognition of Cartwright's extended discussion in its petition to Division 1 (see pp. 12-17 thereof) that "The Review Board erred in not applying the *King case* criteria to the instant Cartwright proceeding."

Cartwright filed its complaint in the District Court below on March 18, 1974. The United States answered by neither admitting nor denying the allegations of the complaint, and neither supporting nor opposing the ICC orders. Three competing motor carriers intervened in support of the ICC's actions.

In their brief submitted to the District Court (pp. 17-20 thereof), counsel for the ICC for the first time advanced the argument that:

> "... Cartwright merely contends that its application should have been judged by some altogether different set of standards allegedly carved out in the *Fernstrom* and *King* decisions, *supra*. Even a cursory analysis of those decisions reveals that there is no such third set of standards and that the *Fernstrom* and *King* cases were decided on the traditional standard of public need. ... Thus, notwithstanding any reference in *King* to the 'criteria established' in *Fernstrom*, 114 M.C.C. at 871, it is clear that each of these cases [cited in footnote 2 of the *King* decision] involved the application of the same standard of public need as was applied in the present case; the distinction lies only in the extent to which the applicant met its burden of proof. ... the present case differs from *Fernstrom* and *King* not in the standards applied but in the extent to which the applicant met its burden of proof under those standards."

No mention was made in the ICC's brief of the fact that the ICC Review Board had found the *Fernstrom-King* crisis criteria inapplicable only because of the erroneous assumption that Cartwright was an "in the future" application, or that Division 1 of the ICC had affirmed that finding and assumption.

In dismissing Cartwright's complaint, the District Court adopted the rationale suggested by ICC's appellate counsel, to wit, no special crisis criteria had ever been established by the ICC's decisions in *Fernstrom* or *King*. In language similar to that set forth in the ICC brief, the District Court stated (Appendix A hereto, pp. 10a-11a, *infra*):

> "Recognizing that opinion writing is not an exact science, we have very carefully examined the *Fernstrom* and *King* cases and are convinced that they did not establish a third set of standards or criteria but simply applied the traditional standard of public need and the traditional criteria to determine the presence or absence of public need as shown by the record of the particular case."

And in support of that analysis, the District Court cited the ICC decision in *Engel Bros. Inc. – Extension*, Docket No. MC-14321, aff'd *sub nom. Engel Van Lines, Inc. v. United States*, 374 F.Supp. 1217 (D.N.J. 1974); but in that case, the application had been filed on August 24, 1970, at least six months after the termination of the crisis period. The *Engel* application was properly treated by the ICC and the district court as an "in the future" case, and thus not subject to the *Fernstrom-King* crisis criteria. See 374 F.Supp. at 1220-1221.

Thus the District Court, like ICC counsel, here took no note of the ICC order in this case that implicitly

recognized the existence and applicability of the *Fernstrom-King* crisis criteria, criteria which would have been utilized here but for the erroneous assumption that Cartwright was an "in the future" case. Instead, the affirmance of the ICC orders was put on the basis that no such criteria ever existed and that Cartwright's application was properly rejected under the *Pan American* general criteria and the *Childress* gateway elimination criteria.

THE QUESTIONS ARE SUBSTANTIAL

This appeal involves questions of great importance in the area of federal administrative action and the judicial review thereof. Those questions stem from the unexplained and discriminatory refusal of the ICC to test this appellant's household goods carrier application by the same *Fernstrom* criteria that were consistently applied to such applications by other competing carriers in appellant's category. The judicial review accorded by the District Court below has not eradicated that discriminatory action. On the contrary, that Court's decision has compounded the gross discrimination against this appellant by an amazing revision and rewriting of the ICC's decisional history. Special criteria carefully and expressly constructed by the ICC have been turned into phantoms, without any indication from the ICC itself that it desires its past precedents to be so mangled.

These are matters that deserve the attention of this Court on the instant appeal, to the end that the case be remanded to the ICC for an informed and non-discriminatory application of the special criteria to the instant application.

1. The ICC's discriminatory refusal to apply its Fernstrom criteria to the instant application raises a substantial and critical problem in federal administrative law.

Did the ICC really mean, as the District Court held, that no special criteria were ever established in its *Fernstrom* and *King* decisions? Or did the ICC really mean that it was, in this proceeding, abandoning its finding that such criteria "must" be applied to all applications filed during the 1969-70 household goods moving crisis? Or did the ICC simply err in treating this application as one "in the future" and not one filed during the 1969-70 crisis? Since the Cartwright application was so clearly filed during that period, why was not this application adjudged by the same criteria applied to every other household goods application filed during that period? How can this application possibly be treated as an "in the future" application?

Those are questions that, singly or collectively, raise in a most aggravated form the problem seemingly put to rest in the prevailing opinion of this Court in *Atchison, T. & S. F. R. Co. v. Wichita Board of Trade*, 412 U.S. 800 (1973). As was there said, 412 U.S. at 805-806:

> "Although the Commission [ICC] must be given some leeway to re-examine and reinterpret its prior holdings, it is not sufficiently clear from its opinion that it has done so in this case. A reviewing court must be able to discern in the Commission's actions the policy it is now pursuing, so that it may complete the task of judicial review – in this regard, to determine whether the Commission's policies are consistent with its mandate from Congress."

In short, if the ICC meant to abandon or reinterpret its *Fernstrom* criteria, or if it felt that the time period

for filing applications subject to such criteria should be altered, it was the duty and function of the ICC so to declare in the first instance. Only then could meaningful judicial review be had, in accordance with § 10(e) of the Administrative Procedure Act. What statutory or regulatory reason exists for summarily abandoning or ignoring those criteria in this instance? Are we to say that this Court performed a useless gesture in its *Atchison* holding, 412 U.S. at 822, that "we require the agency [ICC] to justify its departure from its prior decisions so that we may understand what policies it is pursuing"?

The decision of the ICC in this case, under established doctrine, is subject to review only on those grounds clearly set forth in its administrative determination. *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196 (1947). And the only ground clearly set forth with respect to the ICC's refusal to apply the *Fernstrom-King* crisis criteria was its finding that somehow this was an "in the future" application outside the time scope of those criteria. That finding alone set the contours of proper judicial review. But there was nothing in the ICC's determination that permitted a reviewing court to reassess the very existence or meaning of these criteria. If the ICC meant to deal with the existence or meaning of these criteria, or to abandon such criteria, it should have frankly and expressly dealt with the problem in its administrative determination. A court cannot and should not review a matter not undertaken in the first instance by the agency itself.

The problem here is further aggravated by the fact that the ICC has consistently applied its *Fernstrom* criteria to all but one household goods carrier

applications filed in the 1969-70 crisis period. That one exception is the instant Cartwright application, which was filed on October 20, 1969, just two weeks after the original promulgation of the *Fernstrom* criteria on October 7, 1969. And the Cartwright application led to the production of sufficient evidence to satisfy the *Fernstrom* criteria. Why, then, should not the ICC have concluded here what it concluded in the similar *King* case, where the application was filed on November 17, 1969? The ICC there concluded:

> "As can be readily observed, we are following the criteria established in the *Fernstrom* case in granting this applicant nationwide authority in this proceeding. The subject application was filed November 17, 1969, approximately 1 month after the *Fernstrom* decision was entered. As noted, a number of other moving firms have filed similar applications and have received the authority sought. The evidence presented herein is at least as convincing as the evidence presented in [the other similar proceedings] .... The instant application, filed contemporaneously with the applications of the three above-mentioned carriers, must be decided on the same standards as those other applications, and accordingly, must be granted." 114 M.C.C. at 871-872.

Such a discriminatory selectivity in the application of administrative policies should have no place in federal administrative law. As Circuit Judge Brown declared in his concurring opinion in *Mary Carter Paint Co. v. Federal Trade Commission*, 333 F.2d 654, 660 (C.A. 5, 1964), cert. denied, 379 U.S. 957, the "law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case."

2. The District Court's reinterpretation of the ICC's Fernstrom criteria raises a significant problem as to the proper scope of judicial review.

In *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233, 246 (1972), this Court held that, with respect to judicial review of a federal administrative agency's order, "we must look to its opinion, not to the arguments of its counsel, for the underpinnings of its order." It is the administrative agency, not its counsel, that is authorized by Congress to articulate and enforce statutory commands. See also *Investment Co. Institute v. Camp*, 401 U.S. 617, 628 (1971); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962).

Here the District Court below fell into the error of analyzing and reviewing the *Fernstrom* criteria in terms of the appellate arguments made to the court by the ICC counsel. The court did not look to the relevant "underpinnings" supplied by the ICC for entering the order in question, i.e., the treatment of this as an "in the future" application. It merely looked to and incorporated the argument of ICC counsel that the agency did not mean what it said in its *Fernstrom* and *King* decisions respecting special criteria, and that such criteria never really existed "notwithstanding any reference in *King* to the 'criteria established' in *Fernstrom*." Such criteria, in short, were found to be mere administrative phantoms, invisible to all who agree "that opinion writing is not an exact science." See Appendix A hereto, p. 10a, *infra*.

This Court has said that a reviewing court has no concern "with the correctness of the Commission's reasoning, with the soundness of its conclusions, or

with the alleged inconsistency with findings made in other proceedings before it." *Virginian Ry. v. United States*, 272 U.S. 658, 665-666 (1926). But the instant proceeding is not an exercise in evaluating the reasoning or the consistency of the ICC in these household goods carrier applications. What the District Court has done, under the guise of re-examining and interpreting prior ICC rulings, is to slide "unconsciously from the narrow confines of law into the more spacious domain of [administrative] policy." *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1943).

In an opinion that the ICC might well have written had it desired to repudiate its *Fernstrom-King* crisis criteria, the District Court has created an administrative rationale for so doing. But it has done so at the expense of the established doctrine that, at least in the first instance, it is "the agency's duty to explain its departure from prior norms." *Atchison, T.&S.F.R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973); *Secretary of Agriculture v. United States*, 347 U.S. 645, 653 (1954).

In other words, if the *Fernstrom-King* criteria are to be excised, limited or conditioned in any way, or if the ICC wishes to rewrite or withdraw its own prior precedents, such action must start with a reasoned and informed judgment by the ICC itself, presumably acting in conformity with the policies entrusted to it by Congress. But the District Court has here borrowed the rationale and discretionary notions suggested by ICC counsel, and ascribed such rationale and notions to the ICC, which has never considered them in this proceeding.

Such action by the District Court "is incompatible with the orderly function of the process of judicial

review." *N.L.R.B. v. Metropolitan Ins. Co.*, 380 U.S. 438, 444 (1965). Once again it becomes appropriate to remind the federal judiciary of that salutary principle, particularly since the decision below, if affirmed or left unreviewed, will stand as a dangerous precedent for judicial intervention into administrative policies.

CONCLUSION

For these reasons, probable jurisdiction should be noted on this appeal.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

CARTWRIGHT VAN LINES, INC.,	)	
	)	
PLAINTIFF,	)	FILED
	)	SEP 17 1975
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
INTERSTATE COMMERCE COMMISSION,	)	
	)	Civil Action
DEFENDANTS,	)	No. 74 CV-122-W-4
	)	
BEKINS VAN LINES CO.	)	
LYON VAN LINES, INC.	)	
UNITED VAN LINES, INC.	)	
	)	
INTERVENORS.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Cartwright Van Lines, Inc., the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final

order dismissing the complaint entered in this action on August 4, 1975.

This appeal is taken pursuant to 28 U.S.C. § 1253.

/s/ Charles Ephraim by JAP
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IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI,
WESTERN DIVISION

CARTWRIGHT VAN LINES, INC.,	)	
	)	
Plaintiff,	)	FILED
	)	AUG 4 1975
-vs-	)	
	)	
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,	)	
	)	
Defendants,	)	Civil Action
	)	No. 74 CV-122-W-4
BEKINS VAN LINES CO.	)	
LYON VAN LINES, INC.	)	
UNITED VAN LINES, INC.	)	
	)	
Intervenors.	)	

MEMORANDUM AND ORDER

HUNTER, District Judge.

This is an action to set aside an order of the Interstate Commerce Commission (Division I acting as an Appellate Division) dated January 31, 1973. Pursuant to 28 U.S.C. § 2325 requiring a district court of three judges to be convened in suits attacking orders of the Interstate Commerce Commission, the undersigned Court was designated to hear the case.

Plaintiff, Cartwright Van Lines, Inc., is a corporation organized and existing pursuant to the laws of the state of Washington, having its principal place of business in Grandview, Missouri. It is a small, class one motor common carrier of household goods, with gross, annual

revenue (1970) of between three and four million dollars. It operates 41 trucks, 71 tractors and 85 trailers. It owns only 2 tractors and 27 trailers. The remainder of the fleet is owned either by agents or by owner-operator. Its 1970 net income before taxes was $43,643.00.

The defendants are the Interstate Commerce Commission, three carriers of household goods who were parties in opposition in the proceedings before the Commission, and the United States which was made a party on this appeal and which stands neutral in this controversy.

Cartwright's total authority to transport household goods was the sum of some thirty-four individual grants of authority to transport household goods between a limited number of points in forty-six states and the District of Columbia,[1] and did not include the right to operate *directly* between any and all points contained in its various grants of authority. Many of Cartwright's authorities touched another of its authorities so as to provide "gateways" which to some extent Cartwright used in its transportation operations.[2]

[1] Cartwright did not have authority to transport in Hawaii, Alaska, North Dakota and Nevada.

[2] A "gateway" operation results when a carrier tacks on combines two grants of authority at a point common to both in order to provide a service from a point authorized to be served under one grant of authority to a service point contained within another. The common point is called a gateway. For example, a carrier holds authority from points in the state of Washington to points in the state of Minnesota, and, additionally, is authorized to serve from points in Minnesota to points in California. The carrier is *permitted* to tack these authorities to provide a through service from Washington to California by routing traffic through the common point, the state of Minnesota. Some of Cartwright's tacking is very complex. In going from Maryland to the west coast five separate authorities and four separate gateways are involved.

Believing the use of its gateways to be uneconomical and burdensome in that such use resulted in longer routes than would the use of a direct route, on October 20, 1969, Cartwright applied to defendant Commission for permission to eliminate 16 gateways and to be authorized to render direct service to all points it could serve through its tacking process. Cartwright also sought authority to serve the state of Nevada.[3] Seven common carriers of property, specializing in the transportation of household goods, filed protests. The Department of Defense intervened in support of Cartwright's application. Fernstrom Storage and Van Company intervened as a party in opposition.

As a result of appropriate hearings, the Hearing Examiner found against Cartwright. Eventually his decision, with one modification, was adopted on review by the appellate division of defendant Commission.[4]

Cartwright's Two Contentions

On this appeal Cartwright contends that (1) defendant Commission applied *decisional standards or criteria* in ruling Cartwright's application different from those

[3] Cartwright's application was assigned Docket Number MC-88368 (Sub-No. 22) and titled, "Cartwright Van Lines, Inc., Extension-Elimination of Gateways".

[4] The Hearing Examiner did not consider the evidence presented by the Department of Defense concerning the military commercial traffic in concluding that Cartwright was not providing an effective and competing service with existing carriers. The Hearing Examiner felt that since the Department of the Defense rotated this business, it lacked any competitive effect. However, the Commission did consider this evidence and still adopted the remainder of the findings and the result reached by the Hearing Examiner.

employed by it respecting other like contemporary applications, thereby depriving Cartwright of a full and fair hearing; and (2) that defendant Commission failed to discharge its responsibilities under the National Environmental Policy Act of 1969 by summarily finding no significant effect upon the quality of the human environment "while contemporaneously finding that such issues have a significant environmental impact." Cartwright's counsel both in his supporting brief and in oral argument emphasized that Cartwright is *not* claiming that the action of defendant Commission, for reasons of substantial evidence, is lacking, and concedes that no substantial evidence problem is presented.

Cartwright's First Contention

Illuminating its contention that defendant Commission applied different decisional standards or criteria in denying Cartwright's application from those employed by it in granting other like contemporaneous applications, Cartwright asserts the Commission in *Fernstrom Storage and Van Company Extension-Nationwide Service*, 110 M.C.C. 452 (1969) *aff'd sub nom. Aero Mayflower Transit Co., Inc. v. United States* 1970-1972 Fed. Carr. Rep. #83,308 at 55,442 (S.D. Ind. 1972), not otherwise reported, and in *King Van Lines, Inc., Extension–48 States*, 114 M.C.C. 866 (1972) adopted new and different criteria applicable only to a select number of applicants who somewhat contemporaneously filed for nationwide type authority to transport household goods, and did not give Cartwright the benefit of that criteria, although Cartwright had filed its

application prior to the time some who successfully received that beneficial treatment had filed. Defendants respond that the Commission did not adopt new and different criteria and had applied the same traditional criteria to all.

Some preliminary discussion of background matters will aid in understanding our resolution of the issues presented.

An application to eliminate gateways is an application for a new authority requiring a certificate of convenience and necessity. This is so because even though a carrier might perform service from point A to point C by tacking its separate authorities from A to B and from point B to C via its gateway, the carrier has never been granted authority to operate directly between points A and C. No public need has been shown for that service (A to C) and no consideration has been given to the effect of that service on those carriers authorized to service directly those two points, A to C.[5]

[5] As noted in Motor Common Carriers Property–Routes and Service, 88 M.C.C. 415 at 423, ". . . the two or more authorities which may be tacked at common service points will in virtually every instance have been obtained and without any intention or even realization that they might one day be used in conbination. Thus it is not any requirement of the Interstate Commerce Act or of this Commission that forces a carrier to operate in a circuitous manner. It is rather a wish of the carrier itself to join two of its authorities in order that it can provide a through service not specifically authorized by its certificates and for which it has never made a showing that there is a public need." And, as stated in Martin Van Lines, Inc., Extension–12 States, 79 M.C.C. 767, 771, "There is no requirement of this Commission that applicant join separate operating rights and render service to the public from points in one authority to points authorized under another operating right. * * * (It) is a

The required finding for any certificate of convenience and necessity to issue is set out in Section 207(a) of of the Interstate Commerce Act, 49 U.S.C. § 307(a) which provides, "that the proposed service . . . is or will be required by the present or future public convenience and necessity. . . ." The burden of proof on the issue of public convenience and necessity rests on the particular applicant for authorization of the proposed service.

The traditional underlying criteria for showing the requisite public convenience and necessity for the proposed service are: (1) whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; (2) whether this purpose can or will be serviced as well by existing carriers; and (3) whether this purpose can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest. Pan American Bus Lines Operation, 1 M.C.C. 190 (1936). Thus, the traditional method by which a carrier may show that the public convenience and necessity requires the proposed service is to present evidence of supporting shippers demonstrating the inadequacies of the existing service and the need for additional service.

However, with regard to applications for direct authority to eliminate the necessity for observing gateways, the Commission has adopted alternative

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manner of operation undertaken by applicant on its own volition. To authorize applicant to conduct the proposed operations which it cannot now perform efficiently and effectively in competition with existing carriers, without any showing of need therefor, would be directly contrary to the mandate of the (Interstate Commerce) Act".

criteria by which a carrier may show that the public convenience and necessity requires the proposed service without presenting shippers evidence of public need. Rather, it is sufficient for the applicant to show: (1) that the elimination of the gateways will result in more economical operations; (2) that applicant is *actually* transporting a substantial volume of traffic from and to the points involved by operating in good faith through the gateways, and (3) that elimination of the gateways would not enable it to institute a new service or a service so different from that presently provided as to materially improve its competitive position to the detriment of existing carriers. Childress-Elimination of Sanford Gateway, 61 M.C.C. 421 (1952); Service Trucking Co., Inc., Extension-Frozen Pie and Pastries, 88 M.C.C. 697 (1962).

In support of its contention that a new and third standard was established in *Fernstrom and King*, Cartwright notes that in the latter part of the 1960's the defendant Commission became acutely aware of a need for more carriers in the household goods area to have nationwide or equivalent authority.[6] Cartwright quotes from *King Van Lines, Inc., Extension–48 States,*

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[6]See 84th Annual Report to Congress (June 30, 1974) at pages 52-53 where the Commission stated, "Thus, in Fernstrom Storage & Van Company Extension–Nationwide (110 M.C.C. 452) we granted nonradial household goods authority. This was the first such grant in several decades." The report reviewed the quality and quantity of the service available from existing carriers and concluded that, "due primarily to their failure to provide timely service, these carriers were not able to provide reasonably adequate service. * * * It was determined that the slightly detrimental effect to the existing carriers would be outweighed by the more adequate service that would become available to the public."

114 M.C.C. 866 (1972), page 869-70: "This (King) application is one of several requests for transcontinental household goods authority which were filed shortly after the issuance of the entire commission's decision in *Fernstrom Storage and Van Company–Nationwide*, 110 M.C.C. 452 (1969). Nationwide authority has been granted in seven of these proceedings essentially on the basis of finding (1) that the applicants are already effective competitors for household goods traffic over much of the country, and (2) that conditions prevailing in the industry at the time of filing were such as to warrant the authorization of additional nationwide service. * * * As can be readily observed we are following the *criteria established in the Fernstrom case*. . ." * * * The instant application, filed contemporaneously with the application (of Lyon, Red Ball and Neptune) must be decided on the same standards as those applications, and accordingly must be granted."[7] Cartwright spotlights the words above quoted, "established in the Fernstrom case" as establishing a new, third and favorable standard or criteria which the Commission failed to carry forward and apply to Cartwright.

Recognizing that opinion writing is not an exact science, we have very carefully examined the *Fernstrom* and *King* cases and are convinced they did not establish a third set of standards or criteria but simply applied the traditional standard of public need and the

[7]The King case was filed shortly after the Cartwright case but was decided shortly before the Cartwright case was decided. Of the six applicants including King who filed somewhat contemporaneously plaintiff's application preceded three of them. Two other of those applicants, as well as plaintiff, were not successful. The others, including protestant Lyons, were successful.

traditional criteria to determine the presence or absence of public need as shown by the record of the particular case.

Thus, in *Fernstrom*, as we read that decision, the Commission simply applied the traditional criteria to the record of that case. In doing so, the Commission summarized that applicant's evidence of the inadequacies of the existing service and, hence, the need for additional services, and found the statutorily required showing of public convenience and necessity to have been satisfied. In *King* the Commission summarized the very extensive evidence of shipper dissatisfaction with present services and a need for additional services. While the above quoted language from *King* which has caused Cartwright to believe a third standard has been established is a less than perfect expression of what the Commission was actually doing, we have no doubt left, after taking that language into consideration with all else that was said and done in both *Fernstrom* and *King*, that no new decisional standard or criteria was established in either of those two cases.

Nor did the defendant Commission believe it had set new or had changed old criteria or standards, as evidenced by what it said in *Engel Bros., Inc.–Extension–Household Goods 40 States, aff'd sub nom. Engel Van Lines, Inc. v. United States*, 374 F. Supp. 1217 (D.N.J. 1974).[8] In *Engel* the contention was that the

[8]In *Engel* the Commission stated: "The burden of proof imposed by the statute upon applicant herein does not differ from that imposed in King and the other proceedings mentioned. That burden is to show that the operation or service proposed will serve a public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers, and whether it can be served by applicant with the new operation or service proposed without

Commission had established new and different criteria in *Fernstrom* and *King* for the granting of new authority and had denied Engel the benefit of it. In rejecting that contention the district court stated (374 F. Supp. at page 221): "It is evident from the foregoing analysis that the standards applied in the three cases (Engel, King and Fernstrom) were consistent." The district court also said, "Engel has been unable, however, to adduce any law showing that the Commission was bound under the due process clause of the fifth amendment to accord to Engel the same favorable conclusion that was accorded the applications in the Fernstrom and King cases." And in *Towne Services Household Goods Transportation v. United States*, 329 F. Supp. 815, (W.D. Texas, 1971) a similar contention was made. At page 820, the district court responded, "A basic premise of plaintiff's entire argument seems to be based on the proposition that since other carriers in recent years have been granted unrestricted household goods certificates *on the basis of evidence adduced in other proceedings*, the plaintiff is entitled to a similar certificate as a matter of right. This

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endangering or impairing the operations of existing carriers contrary to the public interest. Pan American Bus Lines Operation, 1 M.C.C. 190 (1936)."

"The instant proceeding differs, however, in two major respects from *King, Trans-American*, and the other named contemporaneous proceedings. First, the latter proceedings were decided under the cloud of a crisis *portrayed on the record in those proceedings, and no such crisis appears on the instant record*, and second, there was *convincing evidence in those proceedings*, of a public need or demand for transporation services which existing carriers were unable or unwilling adequately to supply, while *no such finding can be made on the instant records*." Emphasis added.

reasoning fails to recognize that if the Commission was required in an unbridled fashion to continue to issue these unrestricted certificates that eventually those carriers charged with the public responsibility of rendering a service as a carrier, based on convenience and necessity of the public, would be destroyed. This premise also completely misconceived the statutory scheme under which motor carrier certificates are granted, and the nature of the burden which must be borne by one who seeks such a certificate." (Emphasis ours.)

As an additional contention Cartwright urges that to do what the Commission did is violative of the doctrine announed in *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945) to the effect that where two bona fide applications are mutually exclusive, both must be given a hearing before deciding which one succeeds.

However, the *Ashbacker* doctrine is not applicable to the instant case.[9] The case before us does not present a situation where only one of two contemporaneous applicants can succeed. Nor does it present a situation where if some of the contemporaneous applicants succeed, Cartwright cannot succeed in its efforts to obtain the desired authorization. Rather the situation is that any and all applicants can succeed if that particular applicant on the record made in its hearing satisfies the requirements for obtaining a certificate of public convenience and necessity as set out in the statute, § 207(a) of the Interstate Commerce Act, 49 U.S.C. § 307(a).

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[9]See, Great Western Packers Express v. United States, I.C.C., (D. Colo. 1966) 263 F. Supp. 347.

Although Cartwright has clearly stated it is not raising any question concerning the substantial evidence rule, some of its argument borders that subject, making it desirable that some attention be given to the Hearing Examiner's (and Commission's) finding and ruling that (1) on the record made "it can only be concluded that Cartwright is not an effective competitior on traffic between points sought to be served by the application, and that approval of the application would permit Cartwright to institute a new service for which a public need therefor must be established," and that (2) Cartwright although endeavoring to do so "has not established a public need for the service proposed."

The evidence adduced at the hearings, including Cartwright's series of traffic exhibits covering all shipments during 1970 between points it is authorized to serve directly or through tacking, indicated that while Cartwright endeavored to provide single line service to all authorized points, observance of its gateways between many of its points was not feasible or economically sound because excessive circuity was involved. Hence, in those instances Cartwright would to an unspecified extent interline particular shipments rather than use its gateway. This would be accomplished by Cartwright transporting the shipment over its own authority to a given intermediate point which another carrier was authorized to serve and there tender the shipment to that carrier for delivery to the ultimate destination over that carrier's authority. The Hearing Examiner found and the Commission adopted the finding that the evidence failed to show that Cartwright had actually operated through its gateways which involved excessive circuity, but rather interlined in such

instances.[10] The Hearing Examiner stated that Cartwright had "not shown on this record that it is actually transporting a substantial volume of traffic from and to the points involved and is effectively and efficiently competing with existing carriers for the available traffic."

Cartwright does object to the Hearing Examiner having failed to consider the military commercial traffic in concluding that Cartwright was not providing an effective and competing service with existing carriers. However, the Commission did include that evidence in reaching its findings on that issue and in adopting the result reached by the Hearing Examiner. Obviously if the studies presented in evidence by Cartwright were so set out that they failed to show whether or not the movements handled by Cartwright actually utilized and moved through gateway points that failure remains even though 80 percent of Cartwright's traffic shown in the studies were military in nature.[11]

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[10]The Hearing Examiner explained, "The study does not disclose whether or not the interlined shipments, or any of them, could have been moved by Cartwright by utilizing one or more gateways or whether or not the shipments which are indicated as direct actually traversed one or more gateways. * * * . . . it is not possible to determine from this record whether or not the movements handled by Cartwright moved through Gateway points." See, Report and Order, page 18.

[11]The Department of Defense's position is that it supports the abolishing of all gateway requirements in all cases, and it did not endeavor to show any specific need for additional service in this particular case. The Department of Defense believes all gateway operations are likely to be wasteful and could lengthen the delivery time of the goods of its service people who might be moving.

It has been the consistent position of the defendant Commission that interline operations are not probative of a carrier's operation over its gateways and does not justify a grant of authority under the gateway elimination criteria.[12]

Since plaintiff does not claim that any substantial evidence question is raised on this review, there is no need to set out in this opinion the supporting evidence for the above finding concerning Cartwright's failure to show its use of its gateways that involved excessive circuity. We content ourselves with our observation that the finding is a reasonable one and is supported by substantial evidence.

For all the above stated reasons we find no merit in Cartwright's first contention.

Cartwright's Second Contention

Cartwright's second contention is that defendant Commission failed to discharge its responsibilities under the National Environmental Policy Act of 1969, (N.E.P.A.) 42 U.S.C. § § 4331 and 4332 in particular by summarily finding no significant effect upon the quality of the human environment "*while contemporaneously finding that such issues have a significant environmental impact.*" Defendants respond (1) that this contention of Cartwright's has been rendered moot by the Commission's gateway elimination rules; (2) that Cartwright has

[12]See Docket MC-15 897 (Sub. No. 8), O.K. Transfer and Storage Co. Extension–Elimination of Gateways; Midwest Coast, Inc., Extension–Huron, South Dakota, 74 M.C.C. 233 (1958); Ashworth Transfer Inc., Extension-Explosives, 111 M.C. 860 (1970).

no standing to challenge the Commission's actions on environmental grounds; and (3) that the Commission properly found that the denial of Cartwright's application would have no significant environmental impact.

Turning first to the question of standing, we are aware of that line of cases holding that the fact that one is a competitor of the entity taking the challenged action, and, hence, an economic interest is present, does not give standing to raise a N.E.P.A. challenge.[13] We are also aware that the Commission's negative decision is simply one that leaves Cartwright in the same position it has been in all along, and makes no changes from the status quo. However, we are reluctant to dispose of Cartwright's N.E.P.A. contention on lack of standing in view of the additional fact that it is Cartwright who contends it is the one occasioned to cause environmental damage by the negative decision of the Commission, refusing Cartwright permission to eliminate 16 of its gateways.[14] Restated, Cartwright contends the Commission's denial in February, 1973 of Cartwright's application for direct authority has the effect of causing Cartwright to operate over highly circuitous gateway routes, all to the detriment of the environment. Hence,

[13]See Data Processing Service v. Camp, 397 U.S. 150 (1970); Clinton Community Hospital v. Southern Maryland Medical Center, ____ U.S. ____ (1974). United States v. S.C.R.A.P., 412 U.S. 669 (1973).

[14]See cases cited in previous footnote. Compare, Sierra Club v. Morton, 405 U.S. 727 (1972); Zlotnick v. D.C. Land Redevelopment Agency (D.D.C. 1974) affirmed ____ F.2d ____ (1975); Pizitz v. Volpe, 467 F.2d 208 (5th Cir. 1972); Calvert Cliffs' Coors. Com. v. United States A.E. Comm., 449 F.2d 1109 (1971). Here, use of substantially more circuitous routes might present additional highway safety hazards, highway congestion, fuel and rubber consumption, air and noise pollution, etc.

Cartwright implies that more than a mere economic interest is involved. We elect to proceed to consider the merits of Cartwright's N.E.P.A. contention.

To understand the above italicized portions of Cartwright's second contention, it is necessary to explain an earlier action of the defendant Commission under its rule making power. The National Environmental Policy Act (42 U.S.C. § 4333) mandates that all agencies of the Federal Government shall review their statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of the statute.

Pursuant to the statutory mandate, defendant Commission undertook an in depth study of the combined environmental impact of all gateway operations, solicited the comments of the general public and of all motor carriers, prepared an extensive impact statement, and then proceeded under its rule making powers to make very substantial changes in its motor common carrier regulatory scheme to effectively reduce adverse environmental effects with a minimum of disruption to the transportation industry.[15] In its study the Commission found among other items, that most unnecessary fuel consumption resulted from the more circuitous gateway routes. Accordingly, and on February 28, 1974, it issued new rules providing that gateway operations for which the distance traveled exceeds the direct highway distance between the points

[15]Motor Common Carriers of Property, Routes and Services, Ex Parte No. 55 (Sub. No. 8), 119 M.C.C. 170 (1973).

to be served, by more than 20 percent may no longer be conducted unless an application for direct route authority has been filed with the Commission.[16] Also, where the carrier's operation over a gateway route exceeds by 20 percent or less the distance between the origin and destination points over the most direct available route, the carrier may, but is not required to file a "letter notice" notifying the agency of its intention to conduct direct operations.[17] Thus, for all practical purposes Cartwright has had the benefit of a N.E.P.A. study by defendant Commission that resulted in the Commission finding in effect that the national system of all gateways *considered as a whole* had a substantial effect on the quality of the human environment, and in recognition of its N.E.P.A. duty exercised its rule making power as described above. This, of course, does not relieve defendant Commission from its statutory duties under N.E.P.A. in making decisions and taking other agency action on individual carrier requests for authority for new or modified services. Nor does it mean, as plaintiff contends, that its decision that all gateway operations considered as a whole have a significant effect on the human environment also mean that only a portion of such gateways has that effect. Rather, a separate determina-

[16]49 C.F.R. §1065(b). Even then, such gateway operations will be permitted only until the direct route application has been decided. The Commission is endeavoring to expedite the handling of such applications.

[17]49 C.F.R. 1065(a). Defendant agency advises that Cartwright has filed 67 such letter notices. Presumably this permits Cartwright to use the direct route rather than conform to the former gateway use requirement.

tion of that question is necessary with regard to each new Commission gateway action or decision.

The defendant Commission in recognition of its duty to make a determination of what the effect of its decision on the Cartwright application would be under N.E.P.A. procedures and standards, decided that the evidence did not indicate that the defendant Commission's decision would in any significant manner affect the quality of the human environment. This decision of the Commission is strongly supported by the record in this case. The record shows that very little, if any, traffic would actually pass through Cartwright's more circuitous gateways. Cartwright's evidence reflected a high incidence of shipments interlined with other carriers rather than transported by Cartwright through its gateways. The Hearing Examiner attributed such interlining to the fact that operations over Cartwright's more circuituous gateway routes were uneconomical and impractical, and that Cartwright would continue to forego their use. Thus, it is doubtful whether the Commission's decision to deny Cartwright's application had any measurable or appreciable impact on the quality of the human environment. Certainly such evidence supports the finding that there would be no significant impact.[18]

The Mootness Question

Cartwright presumably now uses the direct route in all instances where its circuitous gateway route adds 20

[18]The statutory test is whether the federal agency decision is a "major federal action significantly affecting the quality of the human environment". See 42 U.S.C. §4331-4332.

percent or less travel distance as compared to the direct route.

Turning to the more than 20 percent type of circuitous route, Cartwright contends the February, 1973 denial of its application for direct authority to operate over highly circuitous routes forced it to operate over highly circuitous gateway routes to the great detriment of the environment. Assuming that Cartwright would actually conduct such likely to be unprofitable operations and further assuming that those so conducted would cause some significant harm to the environment, the answer is that it is precisely those circuitous operations which have been positively proscribed by the new and now effective gateway elimination rules.[19] "Under these new gateway rules which we judicially notice, Cartwright cannot use these highly circuitous gateways, and must obtain authority to transport directly or not transport. Cartwright may or may not be successful under the new gateway rules in obtaining direct route authority as a result of its pending applications which include the applications involved here. But successful or not, Cartwright will no

[19]These new gateway rules which are presumptively valid absent successful challenge have been resorted to by Cartwright to obtain the direct routes it desires. These new gateway rules which we take judicial notice of became effective on February 28, 1974. Cartwright's applications under them are currently pending. See Docket No. M.C. 88368 (Sub-No. 27G). We note that Cartwright under the new rules can continue the use of these gateways only until the I.C.C. acts on its applications concerning them. In view of the I.C.C.'s policy to expedite such action, as a practical matter any possible significant adverse effect on the quality of the human environment resulting from this small interval is so remote as in our judgment to moot Cartwright's N.E.P.A. contentions presented on this appeal.

longer be using the highly circuitous gateways in question in this suit. Hence, no present question or controversy of any appreciable consequence remains concerning any significant effect on human environment being possibly caused by defendant Commission's decision in this case not to grant the requested authority to Cartwright. Thus, Cartwright's N.E.P.A. contentions are now moot.

In accordance with the views above expressed, we find no merit in Cartwright's second contention, and further find that contention is now moot.

IT IS ORDERED that the relief sought by plaintiff be denied and that the complaint be dismissed.

/s/ William H. Webster
Circuit Judge

/s/ Wm. R. Collinson
District Judge

/s/ Elmo B. Hunter
District Judge

APPENDIX B

INTERSTATE COMMERCE COMMISSION
Served APRIL 17, 1972

[Notice To The Parties Omitted]

No. MC-88368 (Sub-No. 22)

CARTWRIGHT VAN LINES, INC., EXTENSION - ELIMINATION OF GATEWAYS

Decided_____

Application seeking a certificate of public convenience and necessity denied.

[Appearances Omitted]

REPORT AND ORDER
RECOMMENDED BY JOSEPH A. REILLY,
HEARING EXAMINER

[Statement Of The Facts And Summary
Of Evidence Omitted In Their Entirety]

DISCUSSION AND CONCLUSIONS

An applicant who seeks to operate directly between two points between which it can presently operate only by traversing a third point (gateway) may prove the requisite public convenience and necessity in one of two ways: (a) By showing that elimination of the gateway will result in more economical operations. When proceeding under this theory, the applicant must also show (1) that it is actually transporting a substantial volume of traffic from and to the points involved by operating in good faith through the gateway, and, in so operating, is effectively and efficiently competing with existing carriers, and (2) that the elimination of the gateway requirements would not enable it to institute a new service or a service so different from that presently provided as materially to improve its competitive position to the detriment of existing carriers. (*Childress - Elimination Sanford Gateway*, 61 M.C.C. 421.) And, (b) by showing that there is a need for the proposed service which is not being met by existing carriers.

Applicant has shown that elimination of the gateways will result in more economical operations. Although the financial benefits which Cartwright states would accrue to it by elimination of the gateways may be overstated to some extent, it still remains that the savings would be substantial. In addition, a more efficient operation would most certainly result in the event of gateway elimination through improved transit times, improved morale among its drivers who, understandably, do not like the added driving time required by gateway observance, and collateral benefits such as reduction in paper work and bookkeeping requirements and improved relations with agents and contractors.

However, Cartwright has not shown on this record that it is actually transporting a substantial volume of traffic from and to the points involved and is effectively and efficiently competing with existing carriers for the available traffic. Admittedly, Cartwright acquires approximately 80 percent of its traffic from military sources. This traffic is distributed by the Department of Defense among the existing authorized carriers on an equitable basis so that it is non-competitive traffic. This traffic cannot be used as a predicate for the finding that applicant is a competitor between the points sought to be served through its gateway nor that it holds itself out to perform an effective and efficient service through its various gateways to the general public. See, *Von Der Ahe Van Lines, Inc., Extension - St. Louis Gateway*, 83 M.C.C. 821, and *Heritage Van Lines, Inc., Extension - Elimination of Gateways* (not printed - decided September 23, 1969).

Cartwright submitted 7 traffic studies covering all shipments moving during 1970 between points within the scope of the instant application. The studies covered 6,172 shipments and reflected the pickup date, weight, origin, destination, whether interlined or direct, revenue and whether the shipment was military or commercial in nature. The study does not disclose whether or not the interlined shipments, or any of them, could have been moved by Cartwirght by utilizing one or more gateways or whether or not the shipments which are indicated as direct actually traversed one or more gateways.

Applying the 80-20 percent ratio of military to commercial traffic experienced by Cartwright results in the movement of 1,230 shipments during 1970 which possibly could be considered as determinative as to

whether or not Cartwright was providing an effectively and efficiently competing service with existing carriers through gateway points. No such determination can be made since it is not possible to determine from this record whether or not the movements handled by Cartwright moved through gateway points. On the record made here it can only be concluded that Cartwright is not an effective competitor on traffic moving between points sought to be served by the application, and that approval of the application would permit Cartwright to institute a new service for which a public need therefore must be established.

Cartwright did attempt to establish through public witnesses that the public need required the services proposed. In general, shippers supporting the application of movements of household goods of employees who had used the services of Cartwright found those services to be satisfactory. On the other hand, such shippers had no real complaint as to the services of other household carriers when used. These shippers were not aware of whether or not Cartwright traversed gateways in movements for them but had no complaint as to the time-in-transit experienced in the movement of the traffic. The exempt freight forwarders whose interest was in the availability of a greater pool of flatbed equipment for the transportation of containerized household goods had no specific complaint on the services provided by any of the household goods carriers, including Cartwright. They expressed a general interest in the elimination of gateways of Cartwirght but had no complaints as to time-in-transit on movements handled by Cartwright for them and, in general, were not aware of whether or not gateways had been traversed in movements by Cartwright for them.

The shippers of electronic and computer products followed the same general line of testimony as the foregoing witnesses. They now use Cartwright and other existing household goods carriers and have no real complaints as to the services of any of them.

The Commission had stated in cases too numerous to cite that an applicant for a new operation or service authorization must meet the following general test:

> "Whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with a new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest."

Applying the above criteria to the instant proceeding, the examiner concludes that the applicant has not established a public need for the service proposed.

FINDINGS

Upon consideration of all evidence of record, the examiner finds that public convenience and necessity do not require the operation for which authority is sought.

In view of the findings, the examiner recommends that the appended order be entered.

By Joseph A. Reilly, Hearing Examiner.

(Signature) Joseph A. Reilly

Recommended by Joseph A. Reilly,
Hearing Examiner

(Signature) Joseph A. Reilly

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of , A. D. 1972.

No. MC-88368 (Sub-No. 22)

CARTWRIGHT VAN LINES, INC., EXTENSION - ELIMINATION OF GATEWAYS

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon; which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That said application be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

ROBERT L. OSWALD,
Secretary.

(SEAL)

SERVICE DATE
AUGUST 1, 1972

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 2, held at its office in Washington, D. C., on the 25th day of July, 1972.

No. MC-88368 (Sub-No. 22)

CARTWRIGHT VAN LINES, INC., EXTENSION - ELIMINATION OF GATEWAYS
(Grandview, Mo.)

Upon consideration of the application, as amended, and the record in the above-entitled proceeding, including the report and recommended order of the examiner, the exceptions filed separately by the applicant and the Department of Defense, intervener-in-support, and the replies to the exceptions filed separately by Allied Van Lines, Inc., and Fernstrom Storage and Van Company, protestants, and jointly by United Van Lines, Inc., and Aero-Mayflower Transit Company, Inc., and Bekins Van Lines Co., and Lyon Van Lines, Inc., protestants; and

It appearing, That the examiner recommended that the application be denied.

It further appearing, That the evidence of record fails to meet the criteria for elimination of a gateway as enunciated in *Service Trucking Co., Inc., Ext. - Frozen Pies & Pastries*, 88 M.C.C. 697 (1962); that such

evidence, including that presented by the Department of Defense (which evidence is entitled to the same weight as that of other shippers), further fails to demonstrate that the public convenience and necessity require the elimination of the gateways involved; that the examiner's findings are in conformity with the decision in *King Van Lines, Inc., Extension - 48 States*, 114 M.C.C. 866 (1972), in which Division 1 concluded that in the future, determinations of public convenience and necessity in the household goods field will necessarily accord due weight to the evidence of the extent to which the public's services are already being met by authorized carriers; and that the evidence of record in this proceeding indicates that the services of existing carriers are adequate and that no need has been demonstrated by the supporting shippers for any of the additional services proposed by applicant;

And it further appearing, That otherwise the pleadings present no new or material matters of fact or law not adequately considered and properly disposed of by the examiner in his report, and are not of such nature as to require the issuance of a report discussing the evidence in the light of the pleadings;

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in the light of the pleadings does not warrant a result different from that reached by the examiner, and that the statement of facts, the conclusions, and the findings of the examiner in his report, as modified herein, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That said application be, and it is hereby, denied.

By the Commission, Review Board Number 2, Members Mills, Boyle, and Parker, (Board Member Boyle not participating).

ROBERT L. OSWALD,
Secretary.

(SEAL)

SERVICE DATE
FEBRUARY 14, 1973

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D. C., on the 31st day of January, 1973.

No. MC-88368 (Sub-No. 22)

CARTWRIGHT VAN LINES, INC., EXTENSION - ELIMINATION OF GATEWAYS
(Grandview, Mo.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicant, filed October 11, 1972, for reconsideration;

(2) Petition of The Department of Defense, intervener-in-support of the application, filed September 18, 1972, for reconsideration;

(3) Joint reply by Allied Van Lines, Inc., and United Van Lines, Inc., protestants, to the petitions in (1) and (2) above, filed November 9, 1972;

(4) Reply by Aero Mayflower Transit Company, Inc., protestant, to the petitions in (1) and (2) above, filed November 11, 1972;

(5) Reply by Fernstrom Storage and Van Company, intervener-in-opposition to the application, to the petitions in (1) and (2) above, filed November 13, 1972;

(6) Joint reply of Bekins Van Lines Co., and Lyon Van Lines, Inc., protestants, to the petitions in (1) and (2) above, filed November 20, 1972;

It appearing, That applicant contends in its above-noted petition, *inter alia*, that a grant of authority herein permitting it to eliminate the gateways sought to be eliminated would be a benefit to the human environment; that, in this context, applicant avers its involved existing authorized services, which assertedly require observation of circuitous gateways, create additional highway safety hazards, in that applicant must assertedly use highways not suitable for its large over-the-road vehicles, and additional highway congestion, fuel and rubber consumption, and air and noise pollution; that, however, there are sufficient alternative means of motor common carriage available to that the shipping public is not required to utilize the admittedly unecological services of applicant; that applicant is not obligated to accept gateway-observation shipments, see *Martin Van Lines, Inc., Extension - 12 States*, 79 M.C.C. 767 (1959), and can reject such shipments if it believes they would cause an adverse effect upon the quality of the human environment; that the evidence of

record does not indicate that applicant has ever or will ever reject such shipments for environmental reasons, but that applicant raised this issue simply to detract attention from the basic transportation standards of proof which it has failed to meet; and that the evidence in this proceeding does not indicate that our decision herein will in any siginificant manner affect the quality of the human environment; compare No. MC-1931 (Sub-No. 12), *Von Der Ahe Van Lines, Inc., Extension - 48 States*, (not printed), decided October 19, 1972; and good cause appearing therefor;

It is ordered, That said petitions be, and they are hereby, denied, for the reasons that the findings of Review Board Number 2 in its decision and order entered in the above-entitled proceeding on July 25, 1972, are in accordance with the evidence and the applicable law, and that no sufficient or proper cause appears for reopening the proceeding for reconsideration.

It is further ordered, That this order shall be served upon Mr. Charles Fabrikant, Director of Impact Statements Office Environmental Protection Agency, 1626 K Street, N. W. Washington, D.C., 20460; Mr. Russell E. Train, Chairman, Council on Environmental Quality, 722 Jackson Place, Washington, D. C., 20006; Mr. Robert H. Cannon, Assistant Secretary for Systems Development and Technology, Department of Transportation, 400-7th Street, S. W., Washington, D. C., 20590; Dr. Merlin K. Duval, Assistant Secretary for Health and Science Affairs, Department of Health, Education and Welfare, HEW North Building, Washington, D. C. 20202.

By the Commission, Division 1, Acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary.

(SEAL)

No. 75-716

In the Supreme Court of the United States

OCTOBER TERM, 1975

CARTWRIGHT VAN LINES, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

FRITZ R. KAHN,
General Counsel,

LLOYD JOHN OSBORN,
Attorney,
Interstate Commerce Commission,
Washington, D. C. 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-716

CARTWRIGHT VAN LINES, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. App. A, 3a-22a; 400 F. Supp. 795) dismissing an action brought to set aside orders of the Interstate Commerce Commission

(J.S. App. B). Those orders denied appellant Cartwright's application for expanded motor common carrier operating authority upon the ground that the proposed operations were not shown to be required by the public convenience and necessity.

1. "Tacking" is the practice of combining separate motor common carrier certificates that share a common service point, or "gateway," in order to perform a through transportation service, via the "gateway," from points authorized in one certificate to points authorized in the other. Some certificates of public convenience and necessity expressly permit tacking and others expressly prohibit it. When a certificate neither permits nor prohibits tacking, the Commission in the past has merely permitted the practice. Since the Commission, in granting the separate certificates, had never found that the public convenience and necessity required through service via the gateway, the provision of such service was left to the carrier's option. But, by the same token, since the carrier had never shown a need for direct service authority, it was required to observe and actually operate through the gateway which it had voluntarily created.

In order to obtain direct service authority, a carrier was required to file an application and demonstrate that such direct service was required by the present or future public convenience and necessity. Traditionally, all motor common carrier applications, including those seeking to eliminate gateways, have been evaluated in light of criteria established in 1936

by the Commission in *Pan American Bus Lines Operation*, 1 M.C.C. 190, 203.[1] However, in 1952 the Commission announced an alternative set of criteria by which a carrier conducting substantial operations through a gateway could obtain a certificate authorizing direct service. *Childress-Elimination Sanford Gateway*, 61 M.C.C. 421, 428.[2] These gateway elimination criteria are founded upon the obvious public interest in efficient operations and the presumption that, if the applicant is already effectively competing with existing carriers while operating through the

[1] The *Pan American* criteria are (1) whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; (2) whether this purpose can or will be served as well by existing lines or carriers; and (3) whether this purpose can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest. In order to satisfy these criteria, an applicant must generally establish a need for additional service through the testimony of supporting shippers.

[2] Under the *Childress* gateway elimination criteria, the applicant must show (1) that it will operate more efficiently and economically by eliminating the gateway; (2) that it is actually transporting a substantial volume of traffic from and to the points involved by operating in good faith through the gateway and, in so operating, is effectively and efficiently competing with existing carriers; and (3) that elimination of the gateway will not enable it to institute a new service or a service so different from that presently provided as materially to improve its competitive position to the detriment of existing carriers. Ordinarily, an applicant may make the required showing under these criteria through the testimony of its employees and the production of operating records, without the necessity of shipper witnesses.

gateway, the grant of direct authority will not cause a "new" service to be instituted.[3]

2. At the time its application was filed on October 20, 1969, Cartwright held approximately 34 individual grants of authority to transport household goods to and from points in most of the continental United States. Although Cartwright had never been granted authority to operate directly between any and all points in the United States, it was technically possible for Cartwright to provide a single-carrier, albeit indirect, service between most states by tacking its various individual authorities.[4] Cartwright's applica-

[3] Recently, the Commission adopted new rules governing gateway operations. See *Motor Common Carriers of Property, Routes and Service*, Ex Parte No. 55 (Sub-No. 8), 119 M.C.C. 530, *aff'd sub nom. Thompson Van Lines, Inc.* v. *United States*, 399 F. Supp. 1131 (D.D.C.), *appeal docketed*, 44 U.S.L.W. 3150 (U.S. September 15, 1975) (No. 75-414). Generally, the effect of the new rules is to prohibit tacking in the future and to require carriers to apply for direct authority if they desire to continue serving points formerly reached by tacking. However, the rules made no change in the alternate criteria by which gateway applications might be evaluated. Thus, applicants seeking to eliminate gateways may still attempt to satisfy either the *Childress* or *Pan American* criteria, or both.

[4] As a practical matter, service via gateways between many of Cartwright's authorized points, although technically feasible, resulted in such highly circuitous routing as to be economically impractical. In such cases, Cartwright found it necessary to interline with other carriers in a service whereby Cartwright transported the shipment over its own authority to a given intermediate point and then tendered the shipment to another carrier for delivery over that carrier's authority to the ultimate destination.

tion, by proposing the elimination of approximately 16 major gateways, sought authority to operate directly between all points in the United States, except for points in Alaska, Hawaii and North Dakota.

An oral hearing was held at which Cartwright introduced evidence admittedly designed to satisfy both the *Childress* and *Pan American* criteria. In issuing his Report and Recommended Order (J.S. App. B, 1b-6b), the Administrative Law Judge found that Cartwright's evidence failed to satisfy either the *Childress* or *Pan American* criteria and that Cartwright had accordingly failed to show that its proposed operations were required by the present or future public convenience and necessity. This decision, with certain modifications not here pertinent, was subsequently affirmed by the Commission's Review Board No. 2 (J.S. App. B, 7b-9b) and, ultimately, by Division 1 of the Commission, acting as an Appellate Division (J.S. App. B, 9b-11b).

On review, Cartwright expressly abandoned any claim that the Commission's decision lacked the support of substantial evidence, thereby effectively conceding that its evidence had failed to satisfy either the *Childress* or *Pan American* criteria. Instead, Cartwright contended that its application should have been evaluated under a third set of standards which, in its view, was established by the Commission in *Fernstrom Storage and Van Company Extension—Nationwide Service*, 110 M.C.C. 452, *aff'd sub nom. Aero Mayflower Transit Co., Inc.* v. *United States*, 1970-1972 Fed. Carr. Rep. § 83,308 at 55,442 (S.D.

Ind. 1972) (not otherwise reported), and embellished in *King Van Lines, Inc., Extension—48 States*, 114 M.C.C. 866. In addition, Cartwright argued that the Commission's denial of its application constituted a major federal action which would significantly effect the quality of the human environment and which, accordingly, must be accompanied by an environmental impact statement prepared in accordance with section 102(2)(c) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c).

The district court found no merit in either of these claims. After carefully examining both the *Fernstrom* and *King* cases, the court was convinced that the Commission had never established a third set of standards but had simply applied the traditional criteria to the evidence introduced in those proceedings (J.S. App. A, 10a-11a). The court also observed the contention that *Fernstrom* and *King* established a different set of criteria had already been explicitly rejected by another three-judge district court in *Engel Van Lines, Inc.* v. *United States*, 374 F. Supp. 1217 (D.N.J.). With regard to Cartwright's N.E.P.A. claim, the court found that the denial of Cartwright's application would have no significant impact on the quality of the environment and that, in any event, the claim had been rendered moot by the Commission's gateway elimination rules.

ARGUMENT

Having long since abandoned any claim that the Commission's decision lacked the support of substantial evidence, and having failed to pursue before this Court any claim relating to the Commission's compliance with N.E.P.A., Cartwright bases this appeal solely upon the theory that the Commission established a third set of criteria which should have been applied in evaluating its application. However, the district court correctly concluded that no third set of criteria was ever established, and this appeal presents no issue warranting plenary consideration by this Court.

In asserting that the Commission established a special third set of standards applicable to only a handful of contemporaneously filed applications for household goods authority, Cartwright relies almost exclusively upon a reference by the Commission in the *King* decision (114 M.C.C. at 871) to "the criteria established in the *Fernstrom* case . . . ." However, "[r]ecognizing that opinion writing is not an exact science . . ." (J.S. App. A; 10a), the district court looked beyond the argument offered by counsel for all parties and carefully examined the full text of the Commission's decisions in *Fernstrom* and *King*. Those decisions demonstrate, beyond any doubt, that no "special" standards were ever established and that the more favorable disposition of the *Fernstrom* and *King* applications was attributable to the quality of the evidence those parties introduced and not to any variance in the standards applied.[5]

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[5] By means of a chart which reflects quantity but not quality (J.S. 13), Cartwright seeks to establish that its evidence was "virtually identical" to that submitted by other carriers whose applications were granted. Of course, the only issue

The district court's conclusion that no "special" criteria had ever been established was further supported by the identical holding of an earlier three-judge district court on the same issue. *Engel Van Lines, Inc.* v. *United States*, 374 F. Supp. 1217 (D.N.J.). While it is quite true, as appellant observes (J.S. 16), that the Engel application was filed at a later date than was the Cartwright application, appellant misinterprets the *Engel* decision by implying that that court acknowledged the existence of a third set of criteria. Instead, the *Engel* court made reference to the relative filing dates of the various applications only *after* expressly holding that no special criteria had been established. See 374 F. Supp. at 1220-21.

In short, the sole claim raised by this appeal concerns only the interests of the appellant, is undercut by a careful reading of the very decisions upon which appellant relies, and has already been fully considered and rejected by two federal district courts.

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raised by Cartwright is not whether its evidence was the same as that submitted by other applicants, but whether the standards by which its evidence was measured differed from those applied in other cases. However, after finding that the *Childress* and *Pan American* standards were properly applied in evaluating Cartwright's evidence, the district court expressly affirmed the Commission's finding that Cartwright's evidence failed to satisfy those standards (J.S. App. A, 14a-16a).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

ROBERT H. BORK,
Solicitor General.

FRITZ R. KAHN,
General Counsel.

LLOYD JOHN OSBORN,
Attorney,
Interstate Commerce Commission.

JANUARY 1976.

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